IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs November 5, 2002

STATE OF TENNESSEE v. LAWRENZO MENTON[1]

Direct Appeal from the Criminal Court for Shelby County
Nos. 00-02081, 00-02082, 00-02083, 00-02084 W. Otis Higgs, Jr., Judge

---

No. W2002-00267-CCA-R3-CD - Filed July 2, 2003

The Defendant was indicted for two counts of aggravated robbery and two counts of aggravated kidnapping. Following a trial, the Defendant was convicted of two counts of aggravated robbery and two counts of simple kidnapping. The trial court sentenced the Defendant as a Range I, standard offender to twelve years' incarceration for each aggravated robbery conviction and to six years' incarceration for each kidnapping conviction. It ordered that the sentences for aggravated robbery be served consecutively and that the sentences for kidnapping be served concurrently with each other and with the aggravated robbery sentences. In this appeal as of right, the Defendant argues (1) that insufficient evidence was presented to support his convictions; (2) that the trial court erred by consolidating the separate counts for trial; and (3) that the trial court erred by ordering him to serve his sentences for aggravated robbery consecutively. We affirm the Defendant's convictions. However, we reverse the trial court's imposition of consecutive sentences and remand to the trial court solely for its determination, consistent with this opinion and the factors set forth in Tennessee Code Annotated § 40-35-115, of its basis for imposing consecutive sentences.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part Reversed in Part and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and NORMA MCGEE OGLE, J., joined.

Brett B. Stein, Memphis, Tennessee, for the appellant, Lawrenzo Menton.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; William L. Gibbons, District Attorney General; and Betsy Carnesale, Assistant District Attorney General, for the appellee, State of Tennessee.

---

[1] We note that the Defendant's name is alternatively spelled "Lorenzo Menton" and "Lawrenzo Menton" throughout the record. Because the latter spelling is used in the indictments in this case, we will use that spelling for purposes of this opinion.

OPINION

The following evidence was presented at the Defendant's trial: Victim John Hoggard testified that at the time of trial, he was an undergraduate student at Middle Tennessee State University. He stated that in 1999, he was a student at Memphis State University, where he was enrolled in a clinical psychology graduate program. Hoggard reported that on September 22, 1999, he was kidnaped and robbed. He recalled that at approximately 1:00 p.m. that afternoon, he was walking alone from the library at Memphis State University to his car, which was parked on a street near the campus. While walking to his car, Hoggard noticed two men approaching him from the opposite side of the street. He stated that as they began to cross the street, one of them asked him if he had change for a dollar, and he responded that he did not. He reported that he then crossed to the other side of the street and continued toward his car. Hoggard testified that the men, however, changed the direction in which they were walking, crossed the street, and began walking behind Hoggard. Suspecting that the men were following him, Hoggard crossed the street again and headed back toward the campus, which he believed was closer than his car.

Hoggard testified that when he had almost reached the campus, one of the men stepped in front of him and "said something about asking for directions." Hoggard identified this man as the Defendant. According to Hoggard, the Defendant then said, "This is a holdup and I have a gun." Hoggard stated that the Defendant had his hand in his pocket as if holding a gun. Hoggard reported that the Defendant threatened to shoot him if he did not hand over his wallet. The other man, who had approached Hoggard from behind, told Hoggard that he also had a gun and instructed Hoggard to "step over toward the bushes before [he] pulled his wallet out." Hoggard complied and handed the men his wallet. He stated that no one was around when this happened.

Hoggard testified that the men then asked him how much money he had in his wallet, and Hoggard estimated that he had $20. The men told him that they needed $800, and Hoggard replied that his automatic teller machine (ATM) card and credit cards were also in the wallet. The men forced Hoggard to write down his personal identification number (PIN) for the ATM card and told him to write a check. However, they then decided that they wanted to take Hoggard to a bank, have him write a check to himself, cash it, and give them the money. Hoggard explained that he complied with the men because he believed they had weapons and because he was afraid they would shoot him if he did not cooperate.

Hoggard reported that the men escorted him down the street to their car. He recalled that the car was parked behind a nursing home, which they passed on the way. Hoggard described the car as a white, four-door, "boxy . . . kind of family car" and stated that it appeared to be a1980's model. Hoggard testified that when they reached the car, the two men got into the front seat of the vehicle, and he got into the back right seat of the car. He noticed that the door handle on the inside of the back right door had been removed. Hoggard stated that the men told him that if he cooperated, "they wouldn't do anything." He stated that one of the men, probably the Defendant, repeatedly asked him, "What's more important to you, your money or your life?"

Hoggard testified that the men drove to a National Bank of Commerce on Poplar Avenue and told him to write a check in the amount of $500. Hoggard began to write the check, but the men then changed their minds and told him to change the amount to $800. He wrote a second check in the amount of $800. The men next attempted to drive through the drive-through line at the bank, but the teller informed them that they would have to cash the check inside the bank. Hoggard stated that he and the Defendant, who was driving the car, went inside the bank together. Hoggard recalled that a bank teller wrote his driver's license on the check and took his thumbprint, but then informed Hoggard that he could not cash the check because Hoggard's personal account was at another bank. Hoggard stated that while he attempted to cash the check, the Defendant talked to another teller about opening an account at the bank. After they left the bank, Hoggard wrote "VOID" across both checks and saved them. The checks were introduced into evidence at trial.

Hoggard testified that after they left the first bank, he and the two men stopped at an Exxon station. In the parking lot of the gas station, he and the Defendant again got out of the car and went inside. The Defendant instructed Hoggard to use his ATM card to get money from an ATM inside the building, and Hoggard complied, withdrawing $200 from his account. The Defendant instructed Hoggard not to tell the Defendant's companion that they were able to withdraw money so that the Defendant could keep the $200 for himself. The Defendant also told Hoggard to use his credit card to retrieve money, but Hoggard told the Defendant that he could not do so because he did not have a PIN for his card. Hoggard reported that the Defendant then told him that they should go to a mall, where Hoggard could use his credit card to buy shoes for the two men. Hoggard stated that when he and the Defendant walked back out to the car, he told the passenger that he was unable to withdraw money, as he had been instructed to do by the Defendant.

Hoggard testified that at this point, the two men planned to transport him to the mall; then to his bank, where he could cash a check for them; and finally back to campus. They drove to Oak Court Mall. There, the men returned Hoggard's credit card and license so that Hoggard could use them to buy shoes. Hoggard stated that when they went inside the mall, he left his backpack in the car.

As they were entering the mall through a department store, the Defendant and his companion walked in front of Hoggard, and while they were not looking, Hoggard turned and ran to the back of the store, where an employee summoned the department store's security guards. The guards, in turn, called the police, who came to the store to question Hoggard. Hoggard stated that he did not see the two men again, but was able to provide a description of the Defendant to the police. He reported that the Defendant and his companion took the following items from him: his ATM card; $200, which he had obtained using his ATM card; his wallet; and his backpack.

Hoggard reported that he was later summoned to the police department because his backpack had been found on the side of the road. He was summoned to the police department a second time on September 27, 1999 to attempt to identify the two men who had abducted him from a photographic lineup. Hoggard stated that he was able to identify the Defendant in the lineup, but not

the Defendant's companion. Hoggard also identified at trial photographs of the car driven by the Defendant during the abduction.

On cross-examination, Hoggard testified that when he was first approached by the two men on September 22, 1999, a woman was walking in the same direction as the two men a few feet in front of them. He stated that once the woman was out of sight, he did not see anyone else on the street. He also stated that he saw elderly people sitting outside of the nursing home that they passed on the way to the car. However, he stated that he did not call for help because he was afraid that the two men would shoot him.

Justus Cousar testified that he was an employee of Munford High School, where he taught and coached baseball. Cousar stated that in 1999, he was a senior at Memphis State University. He reported that on September 24, 1999 around 1:00 p.m., he was walking to a campus parking lot after class when he was approached by two "black males" in a car. He described the car as "a white box-type GM, probably an eighties model."

Cousar stated that the driver got out of the car and asked him directions to the Mall of Memphis. He replied that he did not know how to get to the mall from the campus. The driver of the car, whom Cousar identified as the Defendant, then told Cousar that he had a gun, indicating "something under his shirt," and instructed Cousar to get into the car. Cousar stated that the Defendant's hand was under his shirt around his stomach area. Cousar stated that he did as instructed, got into the car, and lay down in the back seat. He explained that he complied with the men because he had once been employed as a teller at a bank, where he was instructed to fully cooperate with anyone who attempted to rob the bank.

Once inside the vehicle, Cousar thought that when the car stopped, he might try to get out of the car, but he noticed that there were no door handles inside the vehicle for the back doors. Cousar testified that while he was in the back seat and while the car was moving, he was asked to pass his wallet to the man sitting in the passenger's seat. The passenger took the wallet and noticed that it contained an ATM card and a credit card. The Defendant, who was driving the car, then asked Cousar for the ATM card's PIN. Cousar stated that the Defendant stopped the car at least three times so that he and the passenger could make withdrawals using Cousar's PIN; he recalled that the Defendant got out of the vehicle during the first two stops and that the passenger got out of the vehicle on the third stop. He stated that he believed that they also made a fourth stop. Cousar reported that he remained lying down in the back seat of the vehicle while the car was stopped. He testified that while they were driving to the ATM, the passenger was holding a metal bar that was approximately a foot and a half long and told him, "Don't make me hit you in the head with this." Cousar stated that he was "extremely scared" at the time.

Cousar stated that while they were driving to the ATM, the two men were trying to figure out how to get cash using Cousar's credit card. Cousar told them that he did not have a PIN for the card and did not know how to do so. Cousar recalled that the two men stopped the car a final time at what appeared to be a "strip joint" so that Cousar could get money using his credit card. He testified

that the men escorted him inside the club, and while the men stood behind him, he asked the bartender if he could get a cash advance using his credit card. Cousar stated that during this exchange, the Defendant was standing behind him, looking over his shoulder. He testified that the bartender agreed to allow him to use his credit card and gave him $200. Cousar and the men then left the club, the men put Cousar back into the car, and Cousar gave the money to one of the men. He testified that the men next drove him back to an area near the Memphis State University campus and dropped him off. He stated that he had been with the two men for approximately an hour when they released him.

When they released Cousar, the two men told him to walk in the direction of the campus, and he walked to the campus security office. Cousar reported what had happened to the security officer on duty, and the officer called the police. The police arrived at the campus, and Cousar gave them a description of the Defendant and the vehicle that the Defendant was driving. Cousar stated that a few days later, on September 27, 1999, he went to the police department to review a photographic lineup. Cousar reported that he was able to identify the Defendant in the lineup.

The State introduced into evidence a receipt from "Valentine's" in the amount of $240. Cousar testified that the receipt was from the club where he was given a cash advance from his credit card. He stated that he gave $200 to the two men who abducted him and explained that the remaining $40 must have been a charge from the credit card company for the cash advance. Cousar stated that he gave the receipt for the cash advance to the police on the day of his abduction. Cousar testified that in addition to the money from his credit card, the two men withdrew a total of $120 using his ATM card.

Eric Elms testified that he was a second-year law student at the University of Memphis School of Law in 1999. He testified that on September 26, 1999 around 6:00 p.m., he was walking from the law school to his apartment, which was located across the street from campus. He testified that at that time, he had heard that two students had recently been abducted from campus and that there had been some other attempted abductions; he explained that he had learned this information from the campus newspaper and from "yellow safety alerts that had been posted all over campus." Elms stated that as he was walking up the driveway to his apartment, he heard a car pull up behind him. Assuming that the car belonged to a resident of his apartments, he did not initially turn around. However, someone then "hollered at" Elms, and Elms turned to see a man standing outside of the car by the driver's door.

Elms described the car as "an early eighties, white, American car, Pontiac or Oldsmobile." He stated that it was "dirty and beat up," and he reported that it fit the description of the vehicle that had been used in the recent abductions. Elms stated that he was frightened and therefore walked quickly towards his apartment while the driver of the car blew his horn and called out again. Elms then entered his apartment, locked the door, called 9-1-1, and called the campus security.

Elms reported that campus security arrived at his apartment within a minute of his call, and the campus police officer began to collect information from Elms. While the campus officer was

at Elms' apartment, the officer received a radio call indicating that the police had apprehended some suspects. The campus officer then transported Elms to the location where the vehicle was stopped, and Elms identified the car for the police. He stated that at the time, the driver was outside of the car, and another man was inside the car.

Sergeant Stan Bowles of the Memphis Police Department Robbery Bureau testified that he had been a police officer for almost sixteen years and explained that he was assigned to investigate robberies. He stated that on September 22, 1999, he received a case involving the Defendant. He described the case as follows: "[A]n individual was picked up by two male blacks driving a white car. He was made to get inside the car. They carried him to – the first one, I believe, was an ATM machine at a business, threatened him, indicated they had a gun, made him withdraw the money from the ATM." Bowles reported that two days later, he received a second case with the same suspect and car description. He stated, "They also kidnapped somebody in the same area, carried him to [an] ATM machine, carried him to a bank, tried to cash a check, couldn't get the check cashed, carried him to an ATM machine to withdraw the money, and then to the Oak Court Mall where he escaped." He explained that the Robbery Bureau generally tries to assign similar cases to the same investigator. Bowles testified that when he received the cases, he called the two victims to his office to conduct photographic lineups, and he stated that both victims identified the Defendant from the lineup as the perpetrator.

Bowles reported that he took a statement from the Defendant on September 28, 1999, after the Defendant's arrest. He stated that on that date, the Defendant was brought to the Robbery Office to talk about the cases. Bowles stated that the Defendant was offered food and drink and that he was read his rights, which he opted to waive. He reported that when confronted with the facts of the case against him, the Defendant confessed. Bowles and another officer took a statement from the Defendant on September 28, 1999, which was reduced to writing and then signed by the Defendant at 11:10 a.m.

In the statement, the Defendant admitted that he was involved in the robbery of John Hoggard at approximately 1:00 p.m. on September 22, 1999. He stated that Lavar Gray, a member of a gang called the Vice Lords, instructed him to rob and kidnap Hoggard as part of the gang initiation. The Defendant claimed that he did not wish to do so, but complied with Gray because Gray told him that if he did not, "it would get back to the hood." The Defendant told the officers that he "did the talking at first, telling the guy that it was a stick-up and to get in the car," but the Defendant maintained that he "just said what Lavar told [him] to say." He told the officers that he and Gray took Hoggard's wallet, some of his credit cards, and his backpack, which "was thrown out." He stated that they later returned Hoggard's wallet, but kept one of his credit cards. The Defendant maintained that he did not use a weapon during the robbery. He also reported that he and Gray committed the crimes using his white, four-door 1978 Pontiac Grand Am. In his statement, the Defendant described the crimes against Hoggard as follows:

> I'd been talking to Lavar [Gray] to look for a job and he couldn't find one that day and he told me that he needed some money now. Lavar said to go over to Memphis State and let's catch one of these white boys. He went over on Watauga

> [Avenue] and was walking and we saw the little white guy walking the other way. Lavar told me to go tell the guy that it was a stick-up and to follow me to the car. So I did. We got in the car and Lavar asked the guy if he had any money or credit cards and the guy said that he had credit cards. We went to NBC Bank on Poplar [Avenue]. I went in the bank with the guy to try to get some money but they couldn't cash a check so we went back out to the car. I was driving, saw the ATM at the Exxon right down the street, so I pulled in there and went in with the guy and he got $200.00 out of the teller and gave it to me. We went back to the car and the mall was right down the street so Lavar said that we were going to go there to get some shoes and clothes off him. When we got to the mall, went inside, the guy ran off. Me and Lavar went back to the car and left.

The Defendant stated that he kept $50 from the robbery and that Gray kept $150 from the robbery.

In a separate statement given at approximately the same time as the first, the Defendant reported that he and Gray had committed another robbery and kidnapping involving Justus Cousar on September 24, 1999. He reported that he and Gray again used his vehicle to commit the crime. He stated that Gray told the victim "that he had a gun and if he didn't cooperate, he was going to kill him." The Defendant described the second robbery as follows:

> Lavar [Gray] said go to the parking lot and wait till someone comes to the parking lot. A female lady came to the parking lot first and Lavar wanted to get her. I said I really ain't fixing to rob a female. So then we waited till a male came. Lavar told me to get out of the car and tell the male that this is a stick-up, get in the car. That is what I done [sic] and he got in the car. Lavar asked him if he had any money. The guy gave him his wallet. Lavar took $50.00 out and told him did he have any credit cards that we can get any money off of. Then we went to the teller, to the money machine I think at Texaco on Getwell [Road]. I went in the store with the guy and we couldn't get no money off of it. Then we went to the bar on Lamar [Avenue]. It was a shake joint on Lamar called Showgirls. All three of us went in and the male [victim] got $200.00 from the bar. That is when got back in the car and took him back to school and gave him his billfold and stuff back. We dropped him off at school . . . .

The Defendant reported that he obtained $70 from the second robbery, and Gray kept the remaining money. When asked if he would like to add anything to his statement, the Defendant told the officers "[t]hat [he] was threatened by Lavar [Gray] and [Gray] told [him] if this got back to anyone, he was going to deal with [the Defendant] personally."

The Defendant testified on his own behalf at trial. He stated that he was twenty-two years old and that he was living with his father prior to his arrest. He reported that he graduated from Northside High School in 1997 and that he had been attending Shelby State Junior College for a year and a half prior to his arrest. He testified that he worked at Shelby State and at Shelby State Day Care "for work study." He also reported that he was working at a Subway restaurant while he was a full-time student at Shelby State.

The Defendant testified that on September 22, 1999, he and Lavar Gray were in the Memphis State University area to pick up applications. He stated that he told Gray that he might be able to get into Memphis State because he was a "great basketball player," and he explained that he was considering transferring to Memphis State after completing his degree at Shelby State Junior College. The Defendant reported that he and Gray picked up applications and were walking back to the Defendant's car. He stated that they did not have any money, and Gray suggested that they ask someone for money. The Defendant stated that he and Gray approached John Hoggard, who was also walking down the street and whom they did not know.

The Defendant testified that he said to Hoggard, "[T]his is a stick-up, do you have some money." He maintained, however, that his intent was to "trick somebody out of some money," which Gray had suggested. He reported that when he asked whether Hoggard had money, Hoggard replied, "Yes, sir," and immediately said, "Do you want some money?" The Defendant replied that he did, and Hoggard pulled out his wallet and offered it to the Defendant. The Defendant reported that he opened the wallet and found only $20 inside. He claimed that he asked Hoggard, "Is this your last $20.00[?]" and then gave the wallet back to Hoggard. The Defendant denied that this exchange took place near bushes, as Hoggard had testified, and he also testified that other people were walking up and down the street while this occurred.

The Defendant maintained that he did not have a weapon, and he insisted that he explicitly told Hoggard he was not armed, explaining that he was holding only a cellular phone. He maintained that Hoggard was aware that the Defendant was holding a phone because the phone rang during their exchange. The Defendant stated that Hoggard asked whether the Defendant and Gray were going to hurt him, and he replied, "This ain't no weapon, this is a cellular phone. We [sic] not here to hurt you, only thing we wanted was some money." The Defendant testified that Hoggard then said, "I [will] write you out a check now if y'all just leave me alone," but the Defendant reported that he told Hoggard he did not "want to take nothing [sic] from him." He stated that he told Hoggard that he would prefer for Hoggard to cash the check himself. According to the Defendant, he said to Hoggard, "Since the bank is right up the street, do you mind walking down the street, get in my car, let me take you to the bank and you do it yourself."

The Defendant stated that he, Gray, and Hoggard then walked to the Defendant's car, which was parked approximately fifteen to twenty feet away. He described his car as a four-door Pontiac Grand Am and identified it in photographs that had already been introduced into evidence. He reported that they passed some students, doctors, and elderly people on their way to the car. The Defendant testified that he got into the driver's side of the car, Gray got into the passenger's side, and Hoggard got into the back seat of the car. He stated that the inside door handle on the back passenger's side of the vehicle did not work, and he claimed that it was not working when he bought the car.

The Defendant testified that after they got into the car, they drove to a National Bank of Commerce on Highland Avenue. According to the Defendant, he opened the car door for Hoggard, and Hoggard went inside the bank alone while the Defendant waited outside, sitting on the hood of

the car. The Defendant stated that Gray waited inside the vehicle. The Defendant reported that after approximately five minutes passed, Hoggard came out of the bank and told them that he was not able to cash the check and that he needed to go to his own bank down the street. The Defendant stated that he asked Hoggard the amount of the check that he had attempted to cash, and Hoggard replied that he had attempted to cash one check for $800 and another check for $500. The Defendant claimed he told Hoggard: "I'm glad they didn't cash that check because I couldn't pay you that money back anyway." The Defendant reported that Hoggard then opened the rear door of the vehicle and got into the car.

The Defendant stated that he and Gray decided that instead of going to Hoggard's bank, they would go to an Exxon station next to the National Bank of Commerce, get some money using Hoggard's credit card, and then drop Hoggard off. He stated that he planned to take $100 because he would be able to pay that amount back to Hoggard. They then drove to the Exxon parking lot, where the Defendant and Hoggard got out of the car. The Defendant stated that on this occasion, the Defendant and Hoggard went inside the Exxon station together, with Hoggard following the Defendant through the door. He stated that once inside, he went to buy a drink while Hoggard went to the ATM. He testified that two or three people were inside the store, and he was standing approximately three feet away from Hoggard when Hoggard withdrew money. The Defendant reported that when Hoggard finished the transaction, Hoggard called to the Defendant and told him that he had $200. The Defendant maintained that Hoggard gave him the money inside the store, and the Defendant exited the store with Hoggard following behind him.

According to the Defendant, Hoggard got back into the back seat of the car on his own. The Defendant testified that he told Hoggard that he would pay back the $200 "whenever [he] g[o]t a chance." He stated that he then asked Hoggard if he and Gray could buy a pair of shoes using Hoggard's credit card. The Defendant stated that Hoggard agreed to this suggestion, and they then drove to the mall. He reported that as they approached the mall, he returned Hoggard's wallet and credit cards. He testified that he parked the car approximately three to five feet from the entrance to the mall, and he and Gray entered the mall first, followed by Hoggard. He reported, however, that after they entered the mall, Hoggard disappeared.

The Defendant stated that he obtained a total of $200 from Hoggard. However, he claimed that he intended to pay Hoggard back. He also maintained that he told Hoggard that he and Gray would not hurt him.

The Defendant testified that a couple of days after the incident involving Hoggard, he and Gray were involved in a second incident involving Justus Cousar. He stated that he and Gray returned to Memphis State University to turn in the applications that they had previously picked up. The Defendant reported that after handing in their applications, he and Gray walked back to their car through a "crowd of people in the parking lot." He stated that once they got into the car, Cousar, whom they did not know, walked by, and they stopped him, asking if he could "help [them] out with some money." The Defendant explained that they merely planned "to try to trick" Cousar. He stated that Cousar did not respond, so he and Gray got out of the car and said, "Excuse me, sir, could we

have some money [?] We not [sic] here to . . . hurt or harm you any kind of way, we just want some money." The Defendant claimed that he was holding his cellular phone and was not armed at the time. He testified, however, that Cousar mistook the phone for a gun, and the Defendant therefore showed the phone to Cousar, saying, "Look, this a [sic] cellular phone, this ain't no pistol." The Defendant reported that Cousar responded that he would give them money if they agreed not to "do anything to" him. Nonetheless, the Defendant insisted that he did not threaten Cousar at any time.

The Defendant testified that Cousar got into the car. He claimed that he never told Cousar to lie down in the back seat, and he maintained that he never saw Cousar lying down while in the car. He reported that once inside the vehicle, Cousar asked the men whether he would be driven back to campus if he obtained money for the men. The Defendant stated that they then drove directly to "the bar and grill on Lamar [Avenue]." He denied that they stopped along the way at ATMs. He stated that while they were driving, he and Gray had a conversation with Cousar, who asked why they had chosen him. The Defendant stated that they told Cousar that he was "the first person [they] saw." He claimed that they also told Cousar that they were turning in their applications at Memphis State University and that they would pay him back. In addition, he stated that they reassured Cousar that they did not intend to harm him.

The Defendant testified that while they were driving, Gray asked whether "the strip joint" had an ATM, and the Defendant therefore decided to stop at an adult entertainment club. He stated that they arrived at the club at about 2:00 or 2:30 p.m., and all three men got out of the car and went inside. The Defendant stated that Cousar entered the club first. He stated that a bouncer at the entrance to the club searched them before they were allowed to enter. The Defendant reported that he told the bouncer, within Cousar's hearing, that his "friend" was going to get some money with his credit card. He testified that during Cousar's transaction with the bartender, he and Gray were watching a dancer on stage, and he claimed that they were "nowhere near" Cousar. After the transaction, according to the Defendant, Cousar told them that he had the money and that he was ready to leave. They then exited the club and got back into the car, where Cousar gave the Defendant and Gray $50 each. The Defendant testified that Cousar then asked whether they were ready to drop him off, and the Defendant stated that he told Cousar they were ready.

The Defendant testified that they drove Cousar back to campus. According to the Defendant, during the drive to campus, they discussed whether Cousar planned to be on campus the following weekend. The Defendant claimed that he told Cousar that if he planned to be on campus, the Defendant would stop by and pay Cousar back. He stated that they then dropped Cousar off near the campus. The Defendant reported that when Cousar got out of the car, he said, "Thank you, I [will] get out right here because my car [is] right around the corner." He stated that Cousar got out of the car on his own.

The Defendant reported that he and Gray returned to Memphis State University a couple of days later to find Hoggard and Cousar so that they could pay the men back. He explained that he did so because "it was on his conscience" and because he had decided at church that he should return the money. He stated that he stopped his car and called out to Eric Elm, to ask Elms if he knew

Hoggard or Cousar. He testified that Elms, however, did not respond, and he therefore drove away and began to drive around campus in an attempt to locate Hoggard or Cousar. He testified that while they were driving around campus, the police stopped and arrested them.

The Defendant stated that he was arrested on September 26, 1999, and he testified that he gave a statement to police on September 28, 1999. He claimed that he was not allowed to make any phone calls between the time of his arrest and the time that he made his statement, and he also reported that he did not know why he had been arrested until immediately prior to making his statement. The Defendant maintained that he made his statement because he was threatened by the police. He stated that the officers told him that if he refused to make a statement, he would "get 40 years" and that if he made a statement, he would be granted three years' probation. He also claimed that the officers claimed to "smack" him because he "wouldn't talk." The Defendant further claimed that no one read him his rights, and he stated that the officers told him that the waiver of rights form which he signed was "the probation form." In addition, the Defendant reported that when he made his statement, the officers asked him questions, and he merely responded "yes and no." He also claimed that the officers did not include everything he said in the written statement, and he stated that although it was not included in his statement, he told the officers that he was just trying to "trick" the victims. Finally, the Defendant testified that he was "scared half to death" when he made his statement.

I. SUFFICIENCY OF THE EVIDENCE

The Defendant first argues that insufficient evidence was presented to support his convictions. As to each of the two victims, the Defendant was charged with aggravated kidnapping, but was convicted of the lesser-included offense of kidnapping. He was also charged with and convicted of the aggravated robbery of each victim. The Defendant, who points out the conflicting testimony at trial, apparently contends that the State failed to prove beyond a reasonable doubt that he accomplished the taking of property from the victims "with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon," Tenn. Code Ann. § 39-13-402(a)(1), and that it failed to prove that he interfered with the victims' liberty "[u]nder circumstances exposing the other person to substantial risk of bodily injury," id. § 39-13-303(a)(1).

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 324 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this

Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.

A. Aggravated Robbery

The Defendant was charged with and convicted of aggravated robbery, which is defined in pertinent part, as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear," Tenn. Code Ann. § 39-13-401(a), "[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon," id. § 39-13-402(a)(1). We conclude that sufficient evidence was presented to support the Defendant's convictions for aggravated robbery.

Viewing the evidence in the light most favorable to the State, the following events took place in this case. Both victims testified that they were abducted by the Defendant and his companion from the Memphis State University campus. They each testified that the Defendant indicated that he had a gun, and both testified that the Defendant's hand was under his clothing as if holding a gun. The victims both testified that the Defendant forced them to get into a vehicle with one or no interior door handles, and they stated that they complied with the Defendant's demands because they were afraid of being harmed. Other evidence presented at trial indicates that the Defendant and his companion transported the victims to locations away from campus, confining the victims by the threat of a weapon, where the victims were forced to obtain money. The victims were then forced to relinquish the money to the Defendant and his companion. Finally, both of the victims testified that they believed that the Defendant was armed and that he would have harmed them had they not complied with his commands. Although the Defendant claimed that he was not armed, that he was merely holding a phone, and that he informed the victims of this, it was within the jury's purview to reject the Defendant's testimony.

B. Kidnapping

The Defendant was also charged with aggravated kidnapping, but was convicted of the lesser-included offense of kidnapping. Kidnapping occurs, in relevant part, when a person "knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty," id. § 39-13-302(a), "[u]nder circumstances exposing the other person to substantial risk of bodily injury," id. § 39-13-303(a)(1). Unlawful removal or confinement may be accomplished through either "force, threat, or fraud." Id. § 39-13-301(2).

We conclude that sufficient evidence was presented to support the Defendant's convictions for kidnapping. As we have previously stated, each of the victims in this case testified that he was approached by the Defendant and another male, who forced him to accompany them for an extensive period of time to various locations around Memphis to obtain money. During this time, the victims were primarily confined to the back seat of the Defendant's car, which had one or no interior door handles. The victims were confined to the Defendant's car by threat and intimidation, and, viewing the evidence in the light most favorable to the State, could easily have been harmed in the process. Furthermore, victim Justus Cousar testified that the Defendant's companion explicitly threatened him with a metal bar. Based upon the victims' testimony, the jury clearly determined that the Defendant exposed the victims to a substantial risk of bodily injury. See id. § 39-13-303(a)(1). This issue is without merit.

II. CONSOLIDATION OF OFFENSES FOR TRIAL

The Defendant next contends that the trial court erred by denying his motion to sever the offenses in this case. The record reveals that the State initially jointly indicted the Defendant and Lavar Gray. However, at a pretrial hearing, the State argued that the defendants should be severed for purposes of trial, the Defendant agreed to the severance of defendants, and the trial court thus granted the severance. The Defendant then argued that the court also should sever the offenses in his case; he specifically argued that the offenses relating to victim John Hoggard should be severed from the offenses relating to victim Justus Cousar. In response, the State made an oral motion for consolidation of the indictments pursuant to Rules 8(b) and 13 of the Tennessee Rules of Criminal Procedure. At the conclusion of the hearing, the trial court overruled the Defendant's motion to sever and allowed the State to try the separate offenses jointly.

As a preliminary matter, we note that trial court's denial of a motion for severance will be reversed only when there has been an abuse of discretion. See State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999). This Court will not interfere with the exercise of this discretion unless it appears on the face of the record that the accused was prejudiced by the trial court's ruling. State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App. 1982). Whether severance should be granted "depends upon the facts and circumstances involved in the various crimes that are charged." State v. Morris, 788 S.W.2d 820, 822 (Tenn. Crim. App. 1990).

Rules regarding the consolidation and severance of offenses are included in the Tennessee Rules of Criminal Procedure. Rule 8(b) of the Tennessee Rules of Criminal Procedure, which allows for the permissive joinder of offenses, states: "Two or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13 if the offenses constitute parts of a common scheme or plan or if they are of the same or similar character." Tenn. R. Crim. P. 8(b). Rule 13(a) provides as follows: "The court may order consolidation of two or more indictments, presentments, or informations for trial if the offenses and all defendants could have been joined in a single indictment, presentment, or information pursuant to Rule 8." Tenn. R. Crim. P. 13(a).

Nonetheless, Rule 14 of the Tennessee Rules of Criminal Procedure states that "[i]f two or more offenses have been joined or consolidated for trial . . . , the defendant shall have a right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others." Tenn. R. Crim. P. 14(b)(1). To avoid severance, both portions of the rule must be satisfied. See State v. Hallock, 875 S.W.2d 285, 289 (Tenn. Crim. App. 1993).

The first prong of Rule 14(b)(1) of the Tennessee Rules of Criminal Procedure requires that the trial court find a common scheme or plan. In Tennessee, there are three categories of common scheme or plan evidence: (1) evidence showing a distinctive design or signature crime; (2) evidence demonstrating a larger, continuing plan or conspiracy; and (3) evidence that the offenses are part of the same transaction. State v. Moore, 6 S.W.3d 235, 240 (Tenn. 1999). "Before multiple offenses may be said to reveal a distinctive design, . . . the 'modus operandi employed must be so unique and distinctive as to be like a signature.'" Id. (quoting State v. Carter, 714 S.W.2d 241, 245 (Tenn. 1986)).

The second prong of Rule 14(b)(1) of the Tennessee Rules of Criminal Procedure is what the Tennessee Supreme Court has deemed the "primary inquiry" in any severance case: whether the evidence of one offense would be admissible in the trial of the other if the two offenses remained severed. State v. Burchfield, 664 S.W.2d 284, 286 (Tenn. 1984). The court has stated that "'[u]nless [it is] expressly tied to a relevant issue, evidence of a common scheme or plan can only serve to encourage the jury to conclude that since the defendant committed the other crime, he also committed the crime charged.'" Moore, 6 S.W.3d at 239 n.5 (quoting Hallock, 875 S.W.2d at 292).

The court has also stated that "a common scheme or plan for severance purposes is the same as a common scheme or plan for evidentiary purposes." Id. at 240 n.7. Thus, Tennessee Rule of Evidence 404(b) is relevant to our analysis of this issue. Rule 404(b) excludes evidence of "other crimes, wrongs, or acts" committed by the defendant when offered only to show the defendant's propensity to commit the crime charged. See Tenn. R. Evid. 404(b). Generally, evidence that the accused committed crimes independent of those for which he is on trial is inadmissible because such evidence lacks relevance and invites the finder of fact to infer guilt from propensity. See Moore, 6 S.W.3d at 239; see also Tenn. R. Evid. 404(b).

However, evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as "'to show identity, guilty knowledge, intent, motive, to rebut a defense of mistake or accident, or to establish some other relevant issue.'" Moore, 6 S.W.3d at 239 n.5 (quoting Hallock, 875 S.W.2d at 292). Offenses that are part of a common scheme or plan are typically offered to establish the identity of the perpetrator. Id. at 239. As the Tennessee Supreme Court has noted, "identity is usually the only relevant issue supporting admission of other offenses when the theory of the common scheme or plan is grounded upon a signature crime." Id.

The first question, then, for our consideration is whether the offenses in this case were part of a common scheme or plan. Although the trial court's reasons for overruling the Defendant's

motion to sever the offenses in this case are unclear from the record, we conclude that the offenses in this case may be construed to be part of a common scheme or plan in that the crimes perpetrated on the two victims show a distinctive design: The Defendant and his companion approached each of the victims in this case on or near the Memphis State University campus during daylight hours and asked for directions. The Defendant then informed each victim that he was armed, while holding his hand underneath his clothing. He took their wallets and ordered the victims into his car, the same vehicle used during both incidents. The Defendant then drove the victims to locations where the victims could withdraw money using their ATM cards.

Having determined that the offenses in this case were part of a common scheme or plan, we must now determine whether evidence of one offense would be admissible in the trial of the other if the offenses had been severed. We are unable to determine that evidence of the crimes against victim Hoggard would have been admissible in the trial of the crimes against victim Cousar had the offenses been severed. Identity is not at issue in this case. The Defendant actually confessed to the crimes in this case, and each victim identified the Defendant in a photographic lineup and at trial as the perpetrator. Nor do we find that the evidence is admissible to establish some other relevant issue. We therefore conclude that the trial court erred by consolidating the cases for trial.

Nevertheless, a trial court's error in denying a severance under Tennessee Rule of Criminal Procedure 14(b)(1) will be reversed only if the defendant can show that the error more probably than not affected the judgment. See Moore, 6 S.W.3d at 242; see also Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). We conclude that the Defendant in this case has failed to meet that burden and thus that the denial of a severance was harmless error. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

In most severance cases, "'the line between harmless and prejudicial error is in direct proportion to the degree . . . by which proof exceeds the standard required to convict.'" Moore, 6 S.W.3d at 242 (quoting Delk v. State, 590 S.W.2d 435, 442 (Tenn. 1979)); see also Shirley, 6 S.W.3d at 250. In this case, overwhelming proof was presented of the Defendant's guilt. The victims both testified that the Defendant was the perpetrator, and they identified the Defendant prior to trial in photographic lineups. Furthermore, the Defendant confessed prior to trial that he forced both victims into his car, telling them that "it was a stick-up," and that he then transported them to various locations around Memphis, where they obtained money to give to the Defendant and his companion. The Defendant also testified at trial that he was responsible for the crimes in this case, although he claimed at trial that he was merely trying to "trick" the victims, that he was not armed, and that he intended to return the money he took from both victims. Because the evidence in this case was more than sufficient to support the Defendant's convictions, we cannot conclude that the denial of a severance more probably than not affected the outcome of the trial. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). We thus conclude that the trial court's error in refusing to sever the offenses was harmless.

III. SENTENCING

Finally, the Defendant contends that his sentence is excessive. He argues that the trial court erred by imposing consecutive sentences. The State counters that consecutive sentencing is warranted in this case based upon the Defendant's extensive record of criminal activity.

When a criminal defendant challenges the length, range, or manner of service of a sentence, the reviewing court must conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the event that the record fails to show such consideration, the review of the sentence is purely de novo. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b), -103(5); State v. Williams, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

The presumptive sentence to be imposed by the trial court for a Class B, C, D or E felony is the minimum within the applicable range unless there are enhancement or mitigating factors present. Tenn. Code Ann. § 40-35-210(c). The presumptive sentence for a Class A felony is the midpoint of the sentencing range unless there are enhancement or mitigating factors present. Id. § 40-35-210(c). If there are enhancement or mitigating factors, the court must start at the presumptive sentence, enhance the sentence as appropriate for the enhancement factors, and then reduce the sentence in the range as appropriate for the mitigating factors. Id. § 40-35-210(e). The weight to be given each factor is left to the discretion of the trial judge. Shelton, 854 S.W.2d at 123. However, the sentence must be adequately supported by the record and comply with the purposes and principles of the 1989 Sentencing Reform Act. State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986).

When imposing a sentence, the trial court must make specific findings of fact on the record supporting the sentence. Tenn. Code Ann. § 40-35-209(c). The record should also include any enhancement or mitigating factors applied by the trial court. Id. § 40-35-210(f). Thus, if the trial court wishes to enhance a sentence, the court must state its reasons on the record. The purpose of recording the court's reasoning is to guarantee the preparation of a proper record for appellate review. State v. Ervin, 939 S.W.2d 581, 584 (Tenn. Crim. App. 1996). Because the record in this case indicates that the trial court adequately considered the enhancement and mitigating factors as well as the underlying facts, our review is de novo with a presumption of correctness.

Enhancement factors must be "appropriate for the offense" and "not themselves essential elements of the offense." Tenn. Code Ann. § 40-35-114.

> The obvious purpose of these limitations is to exclude enhancement factors which are not relevant to the offense and those based on facts which are used to prove the offense. Facts which establish the elements of the offense charged may not also be the basis of an enhancement factor increasing punishment. The legislature, in determining the ranges of punishment within the classifications of offenses, necessarily took into account the culpability inherent in each offense.

State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994).

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The defendant bears the burden of showing the impropriety of the sentence imposed. Ashby, 823 S.W.2d at 169.

In this case, the Defendant specifically challenges the imposition of consecutive sentences. It is within the sound discretion of the trial court whether or not an offender should be sentenced consecutively or concurrently. State v. James, 688 S.W.2d 463, 465 (Tenn. Crim. App. 1984). A court may order multiple sentences to run consecutively if it finds by a preponderance of the evidence that

> (1) [t]he defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) [t]he defendant is an offender whose record of criminal activity is extensive;
>
> (3) [t]he defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) [t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) [t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) [t]he defendant is sentenced for an offense committed while on probation; or
>
> (7) [t]he defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b)(1)-(7). In addition to these criteria, consecutive sentencing is subject to the general sentencing principles providing that the length of a sentence should be "justly deserved in relation to the seriousness of the offense," id. § 40-35-102(1), and "no greater than that deserved for the offense committed," id. § 40-35-103(2); see also State v. Imfeld, 70 S.W.3d 698, 708 (Tenn. 2002).

The trial court's reasons for imposing consecutive sentencing are unclear from the record. In imposing consecutive sentencing, however, the court specifically stated that it found that the Defendant was not a professional criminal. See Tenn. Code Ann. § 40-35-115(b)(1). The court also found that the Defendant did not have an extensive criminal record. See id. § 40-35-115(2). It appears, based upon several of the court's comments at the sentencing hearing, that the court may have determined that the Defendant is a dangerous offender, see id. § 40-35-115(4), although the trial court failed to make any specific finding to this effect in the record. However, even assuming that the trial court intended to base the imposition of consecutive sentences on a finding that the Defendant is a dangerous offender, the trial court failed to make the appropriate findings supporting the use of this factor. "[T]he imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed." State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995); see also State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). We therefore must remand this case to the trial court to make findings concerning the imposition of consecutive or concurrent sentences.

Accordingly, we REVERSE that portion of the trial court's judgments imposing consecutive sentences and REMAND to the trial court to make specific sentencing findings concerning the imposition of consecutive or concurrent sentences which are consistent with this opinion, and we AFFIRM the judgments of the trial court in all other respects.

_____

ROBERT W. WEDEMEYER, JUDGE